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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PRESBYTERY OF ELIJAH PARISH LOVEJOY by its representatives, the commission members named below, and CORTLEY BURROUGHS, TRACY HUSTON, MANLEY MACE, WILLIAM T. HANCOCK, RICHARD D. SHEWMAKER and LORNA WAGNER, and PRESBYTERY OF ELIJAH PARISH LOVEJOY, INC., a Missouri pro forma decree corporation,

vs.

PAUL JAEGGI, PAUL BARKER, HAROLD BOWERMAN, ROBERT CANFIELD, BEN CARTER, GEORGE DEVLIN, WILLIAM DICK, KARL DOLDE, JIM HYDAR, TERRY JONES, GEORGE LANZ, ROBERT PARKS, FRANK RALL, DAN SMITH, DAROLD STRAND, ARTHUR TAPY, and MEMORIAL PRESBYTERIAN CHURCH OF ST. LOUIS, a Missouri pro forma decree corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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QUESTION PRESENTED

Does a church (in this case The United Presbyterian Church in the United States of America) which is so constituted that the denominational or national church is one church, of which the local or particular churches are subordinate bodies, have the constitutional right, in the free exercise of religion guaranteed under the First and Fourteenth Amendments, to enforce an explicit provision of its denominational constitution allowing one of its governing bodies (a presbytery) to take temporary control of a local church and its property?

PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties. The only corporation among the petitioners, Presbytery of Elijah Parish Lovejoy, Inc., has no parent companies, subsidiaries or affiliates.

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PAUL JAEGGI, PAUL BARKER, HAROLD BOWERMAN, ROBERT CANFIELD, BEN CARTER, GEORGE DEVLIN, WILLIAM DICK, KARL DOLDE, JIM HYDAR, TERRY JONES, GEORGE LANZ, ROBERT PARKS, FRANK RALL, DAN SMITH, DAROLD STRAND, ARTHUR TAPY, and MEMORIAL PRESBYTERIAN CHURCH OF ST. LOUIS, a Missouri pro forma decree corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

Presbytery of Elijah Parish Lovejoy, by its representatives, the commission members named as individual petitioners, and said individual petitioners, namely, Cortley Burroughs, Tracy Huston, Manley Mace, William T. Hancock, Richard D. Shewmaker and Lorna Wagner, and Presbytery of Elijah Parish Lovejoy, Inc., a Missouri pro forma decree corporation, respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Missouri in the above-entitled case.

OPINIONS BELOW

The opinion of the Supreme Court of Missouri (App. A-1) is reported in 682 S.W.2d 465. The opinion of the Circuit Court (App. A-20) is unreported. The judgment reviewed (and reversed) by the Supreme Court of Missouri was the judgment of the Circuit Court; upon transfer of the case from the Missouri Court of Appeals to the Supreme Court of Missouri, the Supreme Court of Missouri "now determines the same as on original appeal", as it states in the present opinion (App. A-3). The opinion of the Missouri Court of Appeals (which had also reversed the Circuit Court's judgment, App. A-3), having been completely wiped out by the transfer, will not even be reported in the Southwestern Reporter, and is of no significance in the present proceeding.

JURISDICTION

The judgment of the Supreme Court of Missouri was entered December 18, 1984 (App. A-1) and its order denying a timely motion for rehearing was made on January 15, 1985 (App. A-39). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., Amend. I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *."

U.S. Const., Amend. XIV, Sec. 1:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law * * *."

STATEMENT OF THE CASE

The provision of the constitution of the United Presbyterian Church in the United States of America[1] (the "UPCUSA") which the trial court enforced in the case at bar but the Supreme Court of Missouri has now refused to enforce, is a provision giving a presbytery (such as the plaintiff Presbytery) the right to take temporary control of a particular church and its property. This provision is, we submit, so plainly entitled to enforcement under *Jones v. Wolf* (1979) 443 U.S. 595, 61 L.Ed.2d 775, 99 S.Ct. 3020, as to warrant summary disposition under Rule 23.1, reversing the Supreme Court of Missouri with directions to enforce this provision.

The provision in question is Section 41.15 which reads (App. A-13 to A-14):

> "Whenever, after a thorough investigation, and after full opportunity to be heard has been accorded to the session in question, the presbytery of jurisdiction shall determine that the session of a particular church is unable or unwilling to manage wisely the affairs of its church, the presbytery may appoint a commission composed of ministers and ruling elders, with the full power of a session. This commission shall take the place of the existing session, if any, which shall cease to act until such time as the presbytery shall otherwise direct."

The particular church in question is Memorial Presbyterian Church, of St. Louis. It had been a church of the denomination for over 100 years. On July 21, 1980, by action (and without a

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[1] Due to mergers following the reunion in June 1983 of the northern and southern divisions of the Presbyterian Church which resulted from the Civil War, the name of the denomination is now the "Presbyterian Church (U.S.A.)" and the name of the plaintiff Presbytery is now "Presbytery of Giddings-Lovejoy". We shall, however, continue to refer to them by the names used throughout this litigation.

dissenting vote) at a simultaneous meeting of Memorial's congregation and of its property-holding corporation, Memorial attempted to dissolve its connection with the UPCUSA (App. A-10).

The Presbytery first held that Memorial's action was null and void (App. A-11) and then took action under Section 41.15 to vest the plaintiff commission "with full power of a session . . . which shall take the place of the existing session of [Memorial], which shall cease to act until such time as the Presbytery shall otherwise direct . . . ." (App. A-11 to A-12).

The Supreme Court of Missouri has conveniently collected in its opinion, enough of the provisions of the UPCUSA's constitution. They are found in footnote 3, beginning at the bottom of page A-12 of our Appendix and extending to the bottom of page A-14. We have had them printed, for ease of reading, in the same size type as the body of this petition, and see no reason to repeat them here.

It is clear from these provisions (App. A-12 to A-14) that the session has exclusive authority over the use of the church buildings, and in fact has authority over "all the affairs and activities" of a particular church except those "accorded to the pastor, to the congregation, or to a higher judicatory" (Sections 41.07 and 41.08). The property-holding corporation of a local church is to act "as may be directed by the session" (Section 62.04).

Substituting a commission for the session is thus a way to take over control of a local church, as Section 41.15 provides.

The Presbytery could have *dissolved* Memorial under Section 42.08, as the Supreme Court of Missouri recognized (App. A-19), in which case the Presbytery would have been entitled to take (and to keep or dispose of) all the local church's property under Section 62.11 (App. A-14). The Presbytery elected the milder remedy of temporarily superseding the session under Section 41.15.

When the present suit was filed, it did not appear that *any* constitutional questions would be involved. *Hayes v. Manning* (1914) 263 Mo. 1, 172 S.W. 897 had settled the law of Missouri by following the "leading case on this subject", *Watson v. Jones* (1872) 80 U.S. (13 Wall.) 679, 20 L.Ed. 666. See 172 S.W. pages 904-905. Following the *Hayes* case, the trial court granted enforcement of Section 41.15 and of the Presbytery's action putting that section into effect (App. A-23; A-25; A-28; A-31). But the Supreme Court of Missouri specifically overruled the *Hayes* case, saying simply (App. A-3):

> "This Court now adopts the 'neutral principles of law' approach as the exclusive method for resolution of church property disputes. To the extent that *Hayes* is inconsistent with this holding, it should no longer be followed."

But the Supreme Court of Missouri did more. Although courts which follow "neutral principles of law" are still required by the free exercise clause to give effect to such plain provisions of denominational constitutions as Section 41.15 (see our argument below), the Supreme Court of Missouri refused to do so. It thus turned the case at bar into a constitutional case, which it had not been before.

We immediately responded by our motion for rehearing which is set out at length beginning at page A-33 of our Appendix. We there alleged among other things that a judgment in accordance with the Missouri Supreme Court's opinion would deny free exercise rights to the plaintiffs and the UPCUSA and deny them property rights arbitrarily and without due process of law in violation of the Fourteenth Amendment in that such judgment (App. A-34)

> "would deny effect to the provisions of the organic law of the UPCUSA, by which the UPCUSA is constituted as one church, of which the particular churches, including Memorial Presbyterian Church, are subordinate parts, and would refuse to enforce the provisions giving the plaintiff

> Presbytery (and its commission) the right to take control of a particular church (in this case Memorial Presbyterian Church) and its property and would effectively extinguish all property rights of the plaintiffs or the UPCUSA with respect to Memorial Presbyterian Church's property."

The Supreme Court of Missouri ruled on this motion for rehearing by overruling it without comment (App. A-39).

The leading case upholding this Court's jurisdiction in this type of situation seems to be *Great Northern Railway Co. v. Sunburst Oil & Refining Co.* (1932) 287 U.S. 358, 77 L.Ed. 360, 53 S.Ct. 145 (Opinion by Mr. Justice Cardozo). And see *State of Missouri ex rel. Missouri Insurance Company v. Gehner* (1930) 281 U.S. 313, 74 L.Ed. 870, 50 S.Ct. 326, where the Supreme Court of Missouri once before "did not refer to the Federal questions raised by the motion for rehearing" (281 U.S. at 320).[2]

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[2] Even though there was as yet no constitutional question in the case, Point II of our principal brief (the same brief in the Court of Appeals and, after transfer, in the Missouri Supreme Court) was that the decision in *Jones v. Wolf* "holding constitutional the 'neutral principles of law' applied by the Supreme Court of Georgia in that case, does not permit the ignoring of the provisions of the Church Constitution involved in the case at bar. On the contrary, those provisions are entitled to enforcement under the Constitution of the United States." Paragraph 5 of our motion for rehearing (App. A-35 to A-36) is based on the fact that the Missouri Supreme Court ignores that point; its opinion never even mentions it. Also, when the Court of Appeals reversed the Circuit Court's judgment, our motion for rehearing in that court, and our applications for transfer to the Supreme Court of Missouri, included allegations substantially the same as paragraph 1 (above quoted) of our motion for rehearing (App. A-34).

REASONS FOR GRANTING THE WRIT

A. The decision in *Jones v. Wolf* (1979) 443 U.S. 595, requires that provisions such as Section 41.15 in the constitution of a church such as the UPCUSA, be enforced. It was on that basis, and on that basis alone, that the application of "neutral principles of law" was upheld in *Jones v. Wolf*.[3]

The church involved in *Jones v. Wolf* was the Presbyterian Church in the United States, the so-called "southern church". It was not the UPCUSA. The southern church did not have in its constitution the provisions that are here involved. The UPCUSA does have them (App. A-12 to A-14).

In *Jones v. Wolf* the congregation of the Vineville church had voted 164 to 94 to withdraw from the Presbyterian Church in the United States, and a commission[4] appointed for the purpose by the presbytery had determined that the minority were the true congregation of the Vineville church.

Before analyzing the decision in *Jones v. Wolf,* it is well to consider two things: the importance of property to the free exercise of religion, and the nature of churches.

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[3] There is a great amount of academic writing and there are many cases concerning church property and the civil courts. We have no occasion even to cite them. We also have no occasion to ask the Court to reopen the matters that were in controversy between the majority and minority opinions in *Jones v. Wolf*. For the opinion of the court not only says that "legally cognizable" (443 U.S. at 606) provisions of such church constitutions have to be enforced, but the foundation of its opinion, made explicit in answer to the criticisms of the dissenting opinion, depends on this proposition.

[4] This was not a commission like the one in the case at bar; it was not appointed under a provision like Section 41.15. The southern church didn't have such a provision in its constitution.

No human activity can be carried on without property—if no other, the food and drink necessary to sustain life. The activities of churches are no exception: property is needed for, among other things, places of worship, the sustenance and support of priests, pastors, and teachers, and to provide income for a multitude of charitable activities. The free exercise of religion of necessity, then, includes the use of property.[5]

This proposition is so obvious that it is implicit in *Jones v. Wolf;* both the opinion of the Court and the dissenting opinion treat the question of how to decide who should get the Vineville church's property, as a very serious constitutional question under the First Amendment.

What is the nature of churches? We are not asking a metaphysical question; we are speaking of the churches that exist and operate in the world, whose activities include holding property. We have heard it said that most people (including church people) know little or nothing about what a church is, *but that everyone thinks he knows.* Are churches "religious societies"? What Congregationalist from New England working for the West Publishing Company, classified all church cases under that heading in the Digest? Is the Roman Catholic Church, governed entirely by bishops with the Pope at the head, a "religious society"? We suggest that, on the contrary, as compared with other institutions in our society, such a church is sui generis. But some churches *are* religious societies. Indeed some organizations of churches are associations of independent religious societies. But many are not.

There are two kinds of churches. There are (1) those which are so constituted that there is a denominational or national church of which the local or particular churches are subordinate

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[5] Of course church property does not belong to the individual members of the church the way the property of a country club belongs to (and could be divided among) the members of the club.

bodies and (2) those which are not so constituted. This is, of course, the classification made in *Watson v. Jones* (1872) 80 U.S. (13 Wall.) 679, 20 L.Ed. 666. This is a *factual* classification.

There is nothing unusual about this kind of classification. The same classification is made by the Labor-Management Reporting and Disclosure Act of 1959, Subchapter IV on "Trusteeships" (29 U.S.C. §§ 461-466). "Trusteeship" is defined (29 U.S.C. §402(h)) as control "whereby a labor organization suspends the autonomy otherwise available to a subordinate body under its constitution or bylaws." Such "trusteeships" got so numerous (and were subject to so many abuses) that Congress passed this statute on the subject. Section 41.15 of the UPCUSA's constitution is a precisely similar kind of provision—a provision by which the UPCUSA in the free exercise of its functions as a church, can see to it that its subordinate bodies perform properly, by taking temporary control of them. Why doesn't the UPCUSA, through its proper agencies who are plaintiffs in this case and petitioners in this Court, have the constitutional right to enforce this provision under the free exercise of religion clause of the First Amendment as made applicable to the states by the Fourteenth?

The UPCUSA is the identical denomination (with a change of name and augmented by mergers) that was before this Court in *Watson v. Jones.* It is the identical denomination which received the benefit of local church property at the time of the merger with it of the Cumberland Presbyterian Church, as held in *Hayes v. Manning* (1914) 263 Mo. 1, 172 S.W. 897.[6]

That it is so constituted as to be within the classification given it in *Watson v. Jones,* is further shown by the fact that a particular presbyterian church can be organized only by authority

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[6] Historical data showing these facts is in evidence as Defendants' Exhibit 30.

of the presbytery (App. A-13; Section 34.02); that it can be dissolved by the presbytery (App. A-14; Section 42.08); and by Section 35.01 (quoted in full at App. A-13) which reads in part as follows:

> "Section 35.01 reads: 'The radical (i.e. fundamental and basic) principles of Presbyterian Church government and discipline are: That the several different congregations of believers, taken collectively, constitute one Church of Christ, called emphatically the Church; that a larger part of the Church, or a representation of it, should govern a smaller * * *.' "

The distinctive feature of churches in this classification is not the mechanics of their government; it is that "the religious congregation or ecclessiastical body holding the property is but a subordinate member" of a general church organization. So said Mr. Justice Miller in *Watson v. Jones* (20 L.Ed. at 674).

By what name should churches of this classification be called? Mr. Justice Miller didn't use *any* name, and there is no name that is accurate. "Hierarchical" means governed by priests; the Presbyterian church is *not* governed by priests. "Connectional" used to be the fashionable term, but it does not in itself have much meaning. The word most commonly used now to describe churches of this classification, is, however, "hierarchical" — a word not even suggested in *Watson v. Jones* — and "hierarchical" is the word used to describe churches of this category by both the majority (443 U.S. at 607) and dissenting (443 U.S. at 619) opinions in *Jones v. Wolf.*

The question in *Jones v. Wolf* was (443 U.S. at 597), "whether civil courts, consistent with the First and Fourteenth Amendments to the Constitution, may resolve the dispute on the basis of 'neutral principles of law,' or whether they must defer to the resolution of an authoritative tribunal of the hierarchical church."

The dissenting opinion would have held that the decision of the church authorities had to be given effect. It said that the object of the inquiry was (443 U.S. at 620):

> "both limited and clear: the civil court must determine whether the local church remains autonomous, so that its members have unreviewable authority to withdraw it (and its property) from the general church, or whether the local church is inseparably integrated into and subordinate to the general church."

And, continued the dissent, since it was "undisputed that under the established government of the Presbyterian Church" the "use and control of the church property have been determined to be in the petitioners", the Georgia courts "should be directed to enter judgment for the petitioners". (443 U.S. at 621)

The decision of the Court in *Jones v. Wolf* is, however, somewhat more complicated.

The Georgia courts had applied a "neutral principles of law" method of deciding such cases. The Court's opinion traces the development of the Georgia doctrine (443 U.S. 599-601). Applying that doctrine the Georgia courts in *Jones v. Wolf* looked at deeds conveying property to the local church, the corporate charter of the local church, state statutes on implied trusts and the constitution of the general church. (443 U.S. at 600-601). They had failed to find "any language of trust in favor of the general church", and held (without more) that the majority faction of the congregation should prevail. (443 U.S. at 601)

This Court held, first (at p. 604), "that a State is constitutionally entitled to adopt neutral principles of law as a means of adjudicating a church property dispute." The Court makes it clear, however, that this does not mean that neutral principles of law have to be the same as the rules adopted in Georgia; it makes it clear (at p. 602) that,

> " 'a State may adopt *any* one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith.' Maryland & Va. Churches, 396 US, at 368, 24 L Ed 2d 582, 90 S Ct 499 (Brennan, J., concurring) (emphasis in original)."

The Court further held, however, that the "Georgia neutral-principles analysis" (p. 606) had not been constitutionally applied in the case before it. For the Georgia courts, having found no language of trust in favor of the denomination, "concluded without discussion or analysis that the title to the property was in the local church and that the local church was represented by the majority rather than the minority." (p. 607).

This Court vacated the judgment and remanded the case because (p. 609-610) "the grounds for decision that respondents represent the Vineville church remain unarticulated." It held that if Georgia had "adopted a presumptive rule of majority representation, defeasible upon a showing that the identity of the local church is to be determined by some other means, we think this would be consistent with both neutral-principles analysis and the First Amendment." (p. 607).

The Court then proceeds to suggest how this problem can be met, saying, among other things (p. 607-608):

> "Most importantly, any rule of majority representation can always be overcome, under the neutral-principles approach, either by providing, in the corporate charter or the constitution of the general church, that the identity of the local church is to be established in some other way, or by providing that the church property is held in trust for the general church and those who remain loyal to it."

In other words, if the constitution of the Presbyterian Church in the United States, even though containing no provision declaring a trust in favor of the denomination, had stated ex-

plicitly how the "identity of the local church is to be established" in case of a schism, that provision would under the First Amendment have had to be enforced. Can there be any doubt, then, that if the constitution of the southern church had contained a provision like Section 41.15, and the presbytery had sought to take control of the Vineville church and its property under that provision, that provision would have been entitled to enforcement?

The Court in *Jones v. Wolf* goes on to point out that it might be that Georgia law would require reference to the denominational constitution to determine "the identity of the 'Vineville Presbyterian Church' " (p. 609). The Court held that if that was true, the civil court could not "usurp the function of the commission appointed by the Presbytery", and *held*[7] (p. 609):

> "Therefore, if Georgia law provides that the identity of the Vineville church is to be determined according to the 'laws and regulations' of the PCUS, then the First Amendment requires that the Georgia courts give deference to the presbyterial commission's determination of that church's identity."

This is certainly a recognition of the constitutional right of a "hierarchical" church to carry out its functions. If the Vineville church had been an independent church — controlled by its congregation alone — the congregational decision (absent some claim that bylaws of the congregation had been violated, or the like) would have ended the matter.

The dissenting opinion vigorously attacked the opinion of the Court. The Supreme Court of Missouri, in the case at bar, has, in practical effect, turned Memorial Presbyterian Church into a church with independent congregational government, free at

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[7] It will be noted that this is no mere admonition, but part of the *holding* in the case, binding on the Georgia courts on remand.

will to sever[4] its connection with the UPCUSA. This is exactly what the dissenting opinion in *Jones v. Wolf* said the holding of the majority would do, but it is what the opinion of the Court, with equal emphasis, said it would *not* do.

Thus the dissenting opinion says (443 U.S. at 613):

> "As a consequence, the Georgia courts could find no acceptable evidence of this authoritative relationship, and they *imposed instead a congregational form of government* determined from state law." (emphasis added)

Again, in footnote 2 (page 613) the dissenting opinion says:

> "The neutral-principles approach consists instead of a rule of evidence that ensures that in some cases the courts will impose *a form of church government* and a doctrinal resolution at odds with that reached by the church's own authority." (emphasis added)

Footnote 3 of the dissenting opinion says (p. 616):

> "Not only will a local congregation of a general hierarchical church be treated as *an independent congregational church* unless the rules of church government have been expressed in specified documents with explicit reference to church property, in addition, all local congregations will be regarded as having a rule of majority control unless they have related their general voting rules explicitly to disputes about church property." (emphasis added)

And the dissenting opinion (advocating the rule of *Watson v. Jones* as an essential rule of constitutional law) says (443 U.S. at 618):

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[4] It must be noted that there is a difference between one or more members or even all the members of a church leaving as individuals (and perhaps forming a new church) and the church leaving *as a church,* taking the ecclesiastical entity and therefore all property that goes with it. Memorial tried to do the latter. Here again there is an analogy with labor unions.

> "Equally important, by recognizing the authoritative resolution reached within the religious association, the civil court avoids interfering indirectly with the religious governance of those who have formed the association and submitted themselves to its authority."

Referring specifically to the part of the dissenting opinion just quoted, the opinion of the Court (443 U.S. at 606) says:

> "This argument assumes that the neutral-principles method would somehow frustrate the free-exercise rights of the members of a religious association. *Nothing could be further from the truth.*" (emphasis added)

The Court says in the same paragraph (p. 606):

> "At any time before the dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property. They can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church. The burden involved in taking such steps will be minimal. And the civil courts will be bound to give effect to the result indicated by the parties, provided it is embodied in some legally cognizable form."[9]

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[9] The above suggestion that "the constitution of the general church can be made to recite an express trust in favor of the denominational church" led to the amendment of the UPCUSA's constitution, the pendency of which amendment precipitated Memorial's attempt to withdraw (App. A-10). This amendment was submitted to the presbyteries at the May 1980 meeting of the General Assembly and adopted by the presbyteries during the ensuing year by a vote of 146 presbyteries for and 4 against (App. A-10 and Transcript 241-242). The property amendment contained a recital that it was declaratory of principles to which the UPCUSA and its antecedent church bodies "have adhered from the inception of the presbyterian form of church government" (Ex. ZZ); this recital was given weight by the trial court (App. A-26).

The part of the opinion of the Court which was not written to reply to the dissent, but simply urges the constitutionality of "neutral principles of law", contains similar language (443 U.S. at 603-604):

> "Through appropriate reversionary clauses and trust provisions, religious societies can specify what is to happen to church property in the event of a particular contingency, or what religious body will determine the ownership in the event of a schism or doctrinal controversy. In this manner, a religious organization can ensure that a dispute over the ownership of church property will be resolved in accord with the desires of the members."

The answer made by the Court's opinion to the contention that "neutral principles of law" will allow the states to turn hierarchical into congregational churches, is not that no constitutional question is present, or that the states may disregard denominational constitutions. The answer is to the contrary: the hierarchical churches can protect themselves by their constitutions, to which the civil courts will be bound to give effect (as a matter of *constitutional* law) if "embodied in some legally cognizable form."

And the denominations can amend their constitutions even "to recite an express trust" of the property of local churches—not by getting the consent of all the individual church members — not by getting the consent of all the individual local churches, but by their normal processes of amendment, of which the Court says, "The burden involved in taking such steps will be minimal" (p. 606).

And it is equally clear that the "legally cognizable form" does not — in order to be entitled to constitutional protection, have to be the expression of a trust. Thus in the portion of the opinion above quoted from page 603, the Court says that the churches can specify "what religious body will determine the ownership in the event of a schism or doctrinal controversy".

Designating a body to make a decision, of course cannot be expressed in the terms of "reversionary clauses or trust provisions." It would have to be designated in language appropriate for such designation.

And in like manner the drafting of a provision giving the denominational authorities the right to take temporary control of a local church, has to be expressed in language appropriate to that subject; it need not, and indeed cannot, be expressed in language of "trust".

The long and short of it is that the Court's opinion in *Jones v. Wolf*, far from holding that "hierarchical" churches have no constitutional protection, or that their local churches can be treated as congregational merely because there is no express language purporting to create a trust, holds exactly the contrary: the Georgia rule which disregarded a denominational decision on a subject on which there was no explicit provision in the denomination's constitution, was upheld as not impairing the free exercise of religion because (and only because) denominations subject to that rule could protect themselves by writing legally cognizable (and therefore constitutionally enforceable) provisions into their denominational constitutions. And the explicit provision of Section 41.15 of the UPCUSA's constitution authorizing the taking of temporary control of a local church by the denominational church of which it is a part, gives, we submit, a bare minimal amount of the protection in the carrying out of its functions, which a denominational church is entitled to have enforced under the free exercise clause.

Much more[10] could be said, but we believe we have said enough.

CONCLUSION

We submit that the writ of certiorari should be granted and that the judgment of the Supreme Court of Missouri should be summarily reversed with directions to enforce Section 41.15 of the constitution of the UPCUSA.

Respectfully submitted,

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[10] For example this case *does* involve a claim (paragraph 1 of our motion for rehearing, App. A-34) that the Missouri court's action deprives the petitioners and the UPCUSA of the property rights long since recognized by *Hayes v. Manning* without due process and in violation of the free exercise clause. The point is suggested by footnote 4 of the Court's opinion in *Jones v. Wolf* (443 U.S. at 606). But the constitutional obligation to enforce Section 41.15 even in a state which had not previously adopted the rule of *Watson v. Jones*, makes it unnecessary to consider this point.

APPENDIX

APPENDIX A

IN THE

SUPREME COURT OF MISSOURI
EN BANC

No. 65853

Presbytery Of Elijah Parish Lovejoy by its representatives, the commission members named below, and Cortley Burroughs, Tracy Houston, Manley Mace, William T. Hancock, Richard D. Shewmaker and Lorna Wagner, and Presbytery Of Elijah Parish Lovejoy, Inc., a Missouri pro forma decree corporation,

Plaintiffs-Respondents,

vs.

Paul Jaeggi, Paul Barker, Harold Bowerman, Robert Canfield, Ben Carter, George Devlin, William Dick, Karl Dolde, Jim Hydar, Terry Jones, George Lanz, Robert Parks, Frank Rall, Dan Smith, Darold Strand, Arthur Tapy, and Memorial Presbyterian Church of St. Louis,
a Missouri pro forma decree corporation,

Defendants-Appellants.

December 18, 1984
Rehearing Denied January 15, 1985

Appeal from the Circuit Court of the City of St. Louis
Honorable George A. Adolf, Judge

Timothy Belz, Mark Belz, St. Louis, W. Jack Williamson, Greenville, Ala., for defendants-appellants.

Richard D. Shewmaker, John B. Shewmaker, Clayton, for plaintiffs-respondents.

GEORGE M. FLANIGAN, Special Judge.

The principal adversaries in this church property dispute are plaintiff Presbytery of Elijah Parish Lovejoy, a presbytery of the United Presbyterian Church in the United States of America, ("UPCUSA" or "the national church"), and defendant Memorial Presbyterian Church of St. Louis, a Missouri pro forma decree corporation, ("Memorial" or "the local church"). At issue are their respective rights to property which prior to this action was in the control of Memorial.

On July 21, 1980, at a duly called concurrent meeting of the congregation and corporation of Memorial, a resolution was adopted, by a vote of 153 to 0 with one abstention, to terminate "the voluntary association which has existed until now" between Memorial and the national church. Although some members of the congregation failed to vote, under church rules, local and national, "silent members, unless excused from voting, must be considered as acquiescing with the majority."

The individual plaintiffs are members of a commission, appointed on April 25, 1981, and acting under the authority of the national church. The commission would assume control of the property in the event the action succeeded. The individual defendants are "ruling elder members of the session" of Memorial.

The trial court, sitting without a jury, found the issues in favor of the plaintiffs and ordered the defendants to deliver to the commission "all assets, funds and property, both real and personal, now under the management and control of [Memorial]." The judgment also required the defendants to deliver to plaintiffs possession of the church building located at 201 Skinker Blvd., St. Louis, Missouri, and to account to the commission for all assets previously disposed of "for purposes other than purposes of [Memorial] as a particular church of [the national church]."

Defendants appealed to the Missouri Court of Appeals, Eastern District, which reversed the judgment. The cause was then transferred to this Court which now determines the same as on original appeal. Rule 83.09.[1]

The dispositive contention of Memorial is that the judgment should be reversed because (a) the trial court erred in holding that *Hayes v. Manning,* 263 Mo. 1, 172 S.W. 897 (1914), required deference to the decision of the national church with regard to the control of the disputed property, (b) the trial court erred in holding that Missouri law forbids the use of "the neutral principles of law approach" enunciated in *Jones v. Wolf,* 443 U.S. 595 (1979), for resolution of church property disputes, and (c) the latter approach, applied to the evidence, required a finding in favor of Memorial.

The trial court, in a memorandum accompanying its judgment, found that the form of organization of UPCUSA is hierarchial and that under Missouri law as expressed in *Hayes,* it, the trial court, was required to give deference to the decision of the highest tribunal within the national church. The trial court also indicated that if it were free to apply the neutral principles approach to the instant facts "it might reach a more equitable result...this result would be to find in favor of [Memorial]."

This Court now adopts the "neutral principles of law" approach as the exclusive method for resolution of church property disputes. To the extent that *Hayes* is inconsistent with this holding, it should no longer be followed. Neither side claims that the neutral principles approach is inconsistent with any of the religious freedom provisions of the Constitution of

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[1] All references to rules are to Missouri Rules of Court, V.A.M.R., and all references to statutes are to RSMo 1978, V.A.M.S.

Missouri, [art. I, § 5, § 6, and § 7], or with Missouri statutes [§ 352.010, et seq.] pertaining to religious associations. For the reasons which follow, this court finds that the record, viewed under the neutral principles approach, requires reversal of the trial court's judgment.

In its brief Memorial takes the position that UPCUSA "is not a hierarchical denomination, in which power flows from the top down, but is rather a connectional or representative denomination, in which power flows from the bottom up, through an ascending scale of judicatories." The brief of UPCUSA describes its government as "representative or republican." Some of the cases discussed below hold, as did the trial court, that UPCUSA is hierarchical. Since the neutral principles approach "accommodate[s] all forms of religious organization and polity," 443 U.S. at 600, this Court need not concern itself with any issue with regard to UPCUSA's form of organization.

Jones involved a dispute over the ownership of church property following a schism in a local church affiliated with hierarchical church organization. The "question for decision", said the Court, was "whether civil courts, consistent with the First and Fourteenth Amendments to the Constitution, may resolve the dispute on the basis of 'neutral principles of law,' or whether they must defer to the resolution of an authoritative tribunal of the hierarchical church." 443 U.S. at 597.

The court pointed out that "the State" has an obvious and legitimate interest in the peaceful resolution of property disputes, and in providing a civil forum where the ownership of church property can be determined conclusively. The court stated:

> It is also clear, however, that 'The First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes.' ... Most importantly, the First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doc-

> trine and practice....As a corollary to this commandment, the Amendment requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization.... Subject to these limitations, however, the First Amendment does not dictate that a State must follow a particular method of resolving church property disputes. Indeed, 'a State may adopt any one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith.'

443 U.S. at 602.

The court then said that "at least in general outline," the "neutral principles of law" approach is consistent with the foregoing principles. *Id.* The neutral principals approach was approved in *Maryland & Va. Churches v. Sharpsburg Church,* 396 U.S. 367 (1970), where a state court settled a local church property dispute on the basis of the language of the deeds, the terms of the local church charters, the state statutes governing the holding of church property, and the provisions in the constitution of the general church concerning the ownership and control of church property. That approach, said the court in *Maryland & Va. Churches,* entailed "no inquiry into religious doctrine." 396 U.S. at 368.

In *Jones* the Court held that a State is "constitutionally entitled to adopt neutral principles of law as a means of adjudicating a church property dispute." 443 U.S. at 604. The primary advantages of that approach, said the court, are "that it is completely secular in operation, and yet flexible enough to accommodate *all forms* of religious organization and polity." *Id.* at 603. (Emphasis added.) The court also said:

> The method relies exclusively on objective, well-established concepts of trust and property law familiar to

> lawyers and judges. It thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice. Furthermore, the neutral-principles analysis shares the peculiar genius of private-law systems in general—flexibility in ordering private rights and obligations to reflect the intentions of the parties. Through appropriate reversionary clauses and trust provisions, religious societies can specify what is to happen to church property in the event of a particular contingency, or what religious body will determine the ownership in the event of a schism or doctrinal controversy. In this manner, a religious organization can ensure that a dispute over the ownership of church property will be resolved in accord with the desires of the members.

Id.

Finally, the court held that a civil court, in examining a religious document pertinent to the dispute:

> must take special care to scrutinize the document in purely secular terms, and not to rely on religious precepts in determining whether the document indicates that the parties have intended to create a trust [in favor of the general church]. In addition, there may be cases where the deed, the corporate charter, or the constitution of the general church incorporates religious concepts in the provisions relating to the ownership of property. If in such a case the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative eccelesiastical body.

Id. at 604.

The neutral principles approach, which the majority opinion in *Jones* discussed, permitted and at least tacitly advocated, is to be distinguished from what the majority termed the "rule of

compulsory deference," *id.* at 605, or what the minority termed, the "rule of adherence," *id.* at 615. The primary source of the rule of deference is *Watson v. Jones,* 80 U.S. (13 Wall.) 679 (1872), which was decided when the federal courts were still applying federal common law and before the religion clauses of the First Amendment were held applicable to the states. Although not a constitutional decision, the rule of deference set forth in *Watson* was said to be "founded in a broad and sound view of the relations of church and state under our system of laws." *Kedroff v. St. Nicholas Cathedral,* 344 U.S. 94 (1952). The minority opinion in *Jones* stated, "[T]he principles of general federal law announced in [*Watson*] are now regarded as rooted in the First Amendment and are applicable to the states through the Fourteenth Amendment." 443 U.S. at 617 n. 4.

Under the "rule of deference," the use of which *Jones* still permits but no longer requires, the initial inquiry, in an intra-church dispute over church property, was "where within the religious association the rules of polity, accepted by its members before the schism, had placed ultimate authority over the use of church property." 443 U.S. at 618-19 (Powell, J., dissenting). If the church government was congregational, in which authority over questions of church doctrine, practice, and administration rests entirely with the local congregation, the civil courts, in disputes concerning the polity of a congregational church, enforce "the authoritative resolution of the controversy within the local church itself." *Id.* If the church government is hierarchical, the lower church being "an integral and subordinate part of a larger church," and "under the authority of the general church," the civil courts must give effect to the duly made decisions of the highest body within the hierarchy that has considered the dispute because the decisions of the local congregation are subject to review by the tribunals of the church hierarchy. *Id.*

In *Jones* the local congregation itself was divided, a situation which the majority addressed in a manner criticized by the

dissenters. Even the dissenters, however, conceded, that the neutral principles rule suffices to settle disputes "between the central councils of a church organization and a unanimous local congregation." 443 U.S. at 614. The case at bar is of the latter variety.

Although both sides to the instant action produced witnesses and introduced many documents, there is no significant factual dispute. Over the years both Memorial and the national church underwent changes of name and mergers. Since both treat their respective predecessors as if they were on the same legal footing as the instant entities, this court will so consider them.

The national church has a written constitution consisting of the Book of Confessions and the Book of Order. The Book of Order includes the Form of Government. The Form of Government permits "a particular church," such as Memorial, to be organized only by the authority of "the Presbytery." Each particular church has a "session" consisting of its pastor and "ruling elders," the latter elected by the congregation from among its active members. A presbytery, such as one of the instant plaintiffs, consists of the ministers and at least one ruling elder delegate from each particular church within the geographic bounds of the presbytery. The session of a particular church chooses the ruling elder delegate from that church to presbytery.

The bodies with governing authority in the national church are called "judicatories." In ascending order they are the session of the particular church, the presbytery, the synod, and the general assembly. A synod covers three or more presbyteries. The general assembly "is the highest judicatory [of the national church] and shall represent in one body all the particular churches thereof." Delegates to the synods and the general assembly are elected by the presbyteries.

Memorial was established in 1864. In 1866 Memorial withdrew from the national church and did not reaffiliate with it

until 1877. During the separation Memorial retained all of the church property. In 1922 Memorial, by written indenture, transferred its assets to a "memorial fund" to be used for the acquisition of land on which a new church building would be erected. In 1937 the trustees of the "memorial fund" executed a "declaration of trust" in which the trustees recited certain actions they had taken under the 1922 indenture, including the acquisition of the land and the erection of the building.

The 1937 document recited that "in order that there be no question as to the trustees fully carrying out the terms and conditions of the trust indenture it is requested that this reiteration of the conditions under which the trust fund was turned over to [Memorial] be recorded in the minutes of [Memorial] and that by resolution the board of trustees [of Memorial] again accept and reaffirm the conditions as herein stated." The 1922 indenture which was incorporated into the 1937 declaration recited that the trustees, called the Memorial Fund Committee, "shall have the power to receive and hold any and all kinds of property, real, personal or mixed, whether received as gifts, bequests, devises, contributions, donations or otherwise, all said properties to be held by it as principal and in trust for the purpose of maintaining and supporting out of the next income thereof, said [Memorial] or its successors, or any church with which it may consolidate."

In 1929 the General Council of the General Assembly of the national church proposed that its Constitution be amended to require that the charter or articles or incorporation of a local church declare "that its property is held in trust under the Constitution of and for [the national church]." This amendment was rejected.

In 1975 Memorial merged with Kingsland Presbyterian Church, a particular church affiliated with the national church. The articles of merger, adopted as the articles of incorporation of the merged association, recited that "the ecclesiastical affilia-

tion" of the association "shall be with [UPCUSA]." The articles contained no provision expressly creating a property interest in favor of UPCUSA.

Prior to May 1980 one of the permanent committees of the national church, at a meeting "occasioned by the decision of the Supreme Court of the United States announced on July 2, 1979 in the case of *Jones v. Wolf,*" recommended the adoption of an amendment to the Form of Government. The amendment recited, in part, that:

> all property held by or for a particular church, a Presbytery, a Synod, the General Assembly, or [the national church] whether legal title is lodged in a corporation, a trustee or trustees, or an unincorporated association, and whether the property is used in programs of the particular church or of a more inclusive judicatory or retained for the production of income is held in trust nevertheless for the use and benefit of [the national church].

The amendment further recited that "whenever property of, or held for, a particular church...ceases to be used by that church, as a particular church of [the national church], in accordance with this constitution, such property shall be held, used, applied, transferred or sold as provided by the Presbytery." This amendment was adopted in May 1981.

On May 25, 1980, the congregation of Memorial unanimously adopted a resolution protesting the proposed amendment and transmitted it to the Presbytery and the General Assembly. On July 16, George Scotchmer, pastor of Memorial, notified the members of Memorial that a special "congregational and corporation meeting" would be held on July 21 to consider terminating Memorial's "voluntary association" with the national church. On July 21 the Memorial congregational incorporation unanimously adopted the resolution terminating Memorial's association with the national church. On July 30 Memorial notified the Presbytery of the July 21 proceedings. On

September 10 the Presbytery notified Memorial that a commission would be appointed to "gather the facts" concerning Memorial's resolution and to make recommendations to the Presbytery. Correspondence ensued between Memorial and the national church in which Memorial stated that its decision to terminate the association was "clear and final".

On April 25, 1981, the commission, the individual plaintiffs, submitted a report to the Presbytery recommending that the Presbytery notify Memorial that it desired that Memorial "be not dissolved or destroyed," that Memorial's resolution of July 21, 1980, be declared null and void, that Memorial remain a particular church of the national church, and that Memorial be commanded by the Presbytery to "cease any attempts to give any effect to said purported termination and not to use any property . . . for any purpose other than the use thereof for purposes of [Memorial] as a particular church of the [national church]." The report further recommended that litigation be brought against Memorial and that Memorial should be notified to show cause, at a meeting of the Presbytery on June 20, 1981, why a commission should not be appointed to assume control of the Memorial property. The notice was given.

After disaffiliation Memorial continued to function as a church. It retained the services of its pastor, hired a second pastor, held regular worship services, administered the various trust funds, and in general engaged in the same activities which it pursued prior to disaffiliation. Memorial amended its articles to delete the reference to affiliation with the national church.

On June 20, 1981, the Presbytery held a meeting which Memorial did not attend. Purportedly acting under § 41.15 of the Book of Order, the Presbytery found that the session of Memorial "is unable or unwilling to manage wisely the affairs of its church in that it has participated in the attempt to terminate the relationship of [Memorial] with [UPCUSA]." The Presbytery vested the commission "with full power of a session

. . . which shall take the place of the existing session of [Memorial], which shall cease to act until such time as the Presbytery shall otherwise direct . . . ." This litigation ensued.

In the wake of *Jones,* property disputes have arisen in other states between a disaffiliating local church, such as Memorial, and the national church, UPCUSA, which is the largest of the Presbyterian denominations in the United States. Courts of last resort in Iowa and Maryland have found in favor of the national church, *Fonken v. Community Church of Kamrar,* 339 N.W.2d 810 (Iowa 1983); *Babcock Memorial v. Presbytery of Baltimore,* 296 Md. 573, 464 A.2d 1008 (1983), while those of New York and South Dakota have found in favor of the local church, *First Presbyterian v. United Presbyterian,* 62 N.Y.2d 110, 464 N.E.2d 454 (1984); *Foss v. Dykstra,* 342 N.W.2d 220 (S.D. 1983).[2] Some of these cases dealt with specific sections of the Book of Order. These sections, and others relied upon by UPCUSA in the instant appeal, are set forth below.[3]

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[2] In *Beaver-Butler Presbytery v. Middlesex Pres. Ch.,* 471 A.2d 1271 (Pa. Commw. Ct. 1984), the Commonwealth Court of Pennsylvania found in favor of UPCUSA in a dispute concerning the right to control property of a local church which had voted, 125 to 31, to disaffiliate. The three-judge appellate court held that UPCUSA had a hierarchical form of government and that a Pennsylvania statute, enacted in 1935, required the court to "accept the Presbytery's decision [in favor of UPCUSA] as final and binding." The court pointed out that even under the neutral principles approach the statute would have to be considered and would be controlling. The Commonwealth Court, after opinion, granted a "petition for allowance of appeal." *Id.*

[3] Section 34.01 of the Book of Order reads: "A particular church consists of a number of professing Christians, with their

Section 34.02 provides that a particular church can be organized only by the authority of a presbytery.

Section 35.01 reads: "The radical (i.e. fundamental and basic) principles of Presbyterian Church government and discipline are: That the several different congregations of believers, taken collectively, constitute one Church of Christ, called emphatically the Church; that a larger part of the Church, or a representation of it, should govern a smaller, or determine matters of controversy which arise therein; that, in like manner, a representation of the whole should govern and determine in regard to every part, and to all the parts united; that is, that a majority shall govern; and consequently that appeals may be carried from lower to higher judicatories, till they be finally decided by the collected wisdom and united voice of the whole Church. For these principles and this procedure, the example of the apostles and the practice of the primitive Church are considered as authority."

Section 41.07 gives the session of a particular church "exclusive authority over the use to which the church buildings and properties may be put."

Section 41.08 gives the session "authority over all of the affairs and activities of the particular church, except such matters as may, by this Form of Government, be specifically accorded to the pastor, to the congregation, or to a higher judicatory."

Section 41.15 reads: "Whenever, after a thorough investigation, and after full opportunity to be heard has been accorded to the session in question, the presbytery of jurisdiction shall determine that the session of a particular church is unable or unwilling to manage wisely the affairs of its church, the presbytery

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(footnote continued)

children, voluntarily associated together for divine worship and godly living, agreeably to the Holy Scriptures, and submitting to a certain form of government."

In *Fonken,* a 6 to 3 decision, the Iowa court affirmed the finding of the trial court that title to the local church property was subject to an implied trust in favor of the national church. The local congregation, by a vote of 192 to 96, had voted to dissolve

Section 62.04 requires a local church to incorporate, if local law permits, "to receive, hold, encumber, manage, and transfer property, and to facilitate the management of its civil affairs in such manner as may be directed by the session of the particular church from time to time and according to this Constitution."

Section 62.11 reads: "Whenever hereafter a particular church is formally dissolved by the presbytery, or has become extinct by reason of the dispersal of its members, the abandonment of its work, or other cause, such property as it may have, both real and personal, shall be held, used, and applied for such uses, purposes, and trusts as the presbytery may direct, limit, and appoint, or such property may be sold or disposed of as the presbytery may direct, in conformity with the Constitution of the United Presbyterian Church in United States of America."

Section 62.12 forbids a particular church to do any of the following acts without the written permission of the presbytery: (a) sell, mortgage, or otherwise encumber any of its real property; (b) acquire real property subject to an encumbrance or condition; (c) lease its real property used for purposes of worship; and (d) lease for more than five years any of its other real property.

(footnote continued)

may appoint a commission composed of ministers and ruling elders, with the full power of a session. This commission shall take the place of the existing session, if any, which shall cease to act until such time as the presbytery shall otherwise direct."

Section 42.08 gives the presbytery power to dissolve churches.

affiliation with UPCUSA. The majority opinion reviewed the evidence under both the rule of deference and the neutral principles approach.

Under the rule of deference the majority held that the decision of the highest authority of a hierarchical church was conclusive upon the civil courts with respect to church property disputes and that UPCUSA is "plainly" a hierarchical organization. The court said that the local church's "right" to leave UPCUSA did not include the "right to take church property with them" The articles of incorporation of the local church stated that the latter's purpose was "to operate and maintain a Presbyterian church, affiliated with [UPCUSA]." The court held that the local congregation could not defeat property rights of UPCUSA, if they existed, by merely voting to disaffiliate and restating the local church's articles of incorporation.

Utilizing the neutral principles approach, the majority opinion made the assumption that title to the property was in the local church and held that the decisive issue was whether the Book of Order established an implied trust in favor of UPCUSA. The court held that the provisions of the Book of Order, construed together, gave UPCUSA "exclusive ultimate control of the use and disposition of local church property" and that "an implied trust exists as a result of UPCUSA's polity giving it determinative authority over the property of its subordinate churches."

The dissenters in *Fonken* agreed that UPCUSA would prevail under the rule of deference. The dissenters felt, however, that the dispute should be resolved under the neutral principles approach and that application of the latter would uphold the local church. The dissenters said that the only provision in the Book of Order which "remotely approaches language of trust" is § 62.11 which UPCUSA had conceded did not apply to the dispute under scrutiny.

In *Babcock* the local church, by a vote of 228 to 6, voted to withdraw from the national church and the session of the local

church made, by deed, "an absolute and irrevocable gift" of real estate to a new corporation which was "an unaffiliated Presbyterian church." The by-laws of the local church recognized its affiliation with UPCUSA and recited that the by-laws were subordinate to the Constitution of UPCUSA. The Maryland court pointed out that under 62.12 of the Book of Order a local church could not sell or mortgage its real estate without written permission of the Presbytery. The court held that if the local church could not sell property without the Presbytery's permission, it could not give it away. At p. 1017 the court said: "*More importantly,* however, applying neutral principles of law, the church corporation lacked power under *Maryland corporation law* to make the gift." (Emphasis added).

In *First Presbyterian* the New York Court of Appeals held that although UPCUSA is a hierarchical organization, the local church, upon disaffiliation by a congregation vote of 334 to 4, was entitled to a resolution of the property dispute through application of the neutral principles approach.

Title to the land was held by the local church under deeds which did not include "language of trust or restriction vesting a present or future interest in the Albany Presbytery or the UPCUSA." The charter of the local church was "silent on the question of how the property is to be owned," and there was nothing in the New York Religious Corporations Law which affected the issue.

The court then considered the Book of Order. In examining it, said the court, it must "look only to provisions relating to property and it must interpret them in a secular light." The court found no provision in the Book of Order which created an express trust in favor of UPCUSA. The court discussed several sections of the Book of Order, including §§ 41.07, 41.08, 41.15, and 62.11, and found that none of them contained language sufficient to show an intention to establish an implied trust in favor of the national church. The court found "nothing in the Book of Order to support [the national church's] position."

In *Foss* the South Dakota court, using the neutral principles approach, found in favor of the local church. The court discussed §§ 41.07, 41.15, 62.11 and 62.12 of the Book of Order and held that they do not contain language creating a trust, express or implied, in favor of the national church. Referring to those four sections the court said, at pp. 224-25: "Although these provisions may limit a local church's use of the property while it is a member of the denomination, the language does not go far enough to constitute trust or reversionary terms such as the Supreme Court was seeking in [Jones v. Wolf]."

The court also stated that UPCUSA's adoption of the express trust amendment in 1981, after the local church had disaffiliated, "provides additional support to our conclusion that the Book of Order as it existed on [the date of disaffiliation] did not contain provisions creating a trust of local property."

In applying the neutral principles approach to the instant record, this court in conformity with *Jones* must refrain from resolving the dispute on the basis of "religious doctrine and practice" and must rely "exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges." Documents, including religious documents, pertinent to the dispute, must be scrutinized in purely secular terms. This court must not "rely on religious precepts in determining whether the document indicates that the parties have intended to create a trust" in favor of the national church. If the deed, local church charter, or national church constitution "incorporates religious concepts in the provisions relating to the ownership of property" and if the interpretation of those instruments would require the resolution of a religious controversy, then this court "must defer to the resolution of the doctrinal issues by the authoritative ecclesiastical body."

No provision in Memorial's charter or by-laws is relied upon by the national church to establish its property interest. The deeds to the involved land name Memorial as grantee and make no mention of the national church. With one exception, various

trust funds, including those established for building purposes, make no mention of the national church. One fund did mention the national church but not as a beneficiary.

The national church does not claim that any Missouri statute serves to create a trust in its favor with respect to the property in dispute. Control of the property has always been exercised by Memorial without interference by the national church. The national church contributed nothing to the acquisition of any of the disputed property. From time to time Memorial borrowed money and secured the loans with deeds of trust on the real estate. The national church was not mentioned in the documents effectuating those transactions.

In 1936 the local church was given $580 by the national church and the indenture reflecting that gift recited that if the local church ceased to be connected with the national church the amount of the grant was to be repaid with interest. The national church was given a security interest only in the land, defeasible upon repayment of the debt. This interest was inconsistent with a claim of right to control all property upon disaffiliation.

In order for the national church to prevail under the neutral principles approach on the instant record it must do so on the basis of the Book of Order. It will be recalled that in 1929 there was an unsuccessful attempt to amend the Book of Order so as to require a local church to provide in its articles of incorporation that its property was held in trust for the national church. It was not until May 1981, after Memorial's disaffiliation, that such an amendment was adopted.

None of the sections of the Book of Order set forth in footnote 3 contains any language expressly creating a trust in church property in favor of the national church.

Although § 35.01 sets forth, in general terms, that a larger part of the church should determine matters of controversy "which arise therein," and mentions the carrying of appeals to

"higher judicatories," it makes no specific reference to a property dispute between the national church and a local church which has disaffiliated. The action taken by the Presbytery on June 20, 1981, after disaffiliation, was purportedly based on § 41.15 which contains no language, even when construed with §§ 41.07 and 41.08, sufficient to show the existence of a trust in favor of the national church with respect to the property of Memorial or a revisionary (sic) interest therein.

The Presbytery made no effort to invoke § 42.08 with regard to dissolution of the local church and indeed disclaims such intent. Thus the dissolution provisions of § 62.11 do not come into play. Other situations are contemplated by § 62.11 but they are not present here. Memorial has not become "extinct by reason of the dispersal of its members," nor has Memorial abandoned it, that is Memorial's work. Although disaffiliated, Memorial carries on the same religious activities which it practiced prior to the separation.

Although § 62.12 gives the Presbytery supervisory authority over specified real estate transactions of a particular church, that section, too, is silent with regard to any reversionary or trust interest of the national church with respect to the property of a local church which has disaffiliated.

This court agrees with the holdings in *First Presbyterian* and *Foss* that the Book of Order, as it existed on July 21, 1980, did not create an express or implied trust in favor of UPCUSA with respect to the property of Memorial.

The judgment is reversed.

GEORGE M. FLANIGAN,
Special Judge

Rendlen, C.J., Welliver, Higgins,
Gunn, Billings and Blackmar, JJ.,
concur; Donnelly, J., not sitting.

APPENDIX B

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

Cause No. 814-00244

Division No. 2

Presbytery of Elijah
Parish Lovejoy, et al.,
Plaintiffs,

v.

Paul Jaeggi, et al.,
Defendants.

MEMORANDUM OPINION
AND
ORDER OF COURT

This cause was heard before the Court in the presence of respective counsel September 13 and 14, 1982. The parties were given leave to file post-trial briefs concurrently within 14 days thereafter, at which time the cause was taken as submitted.

To speak succinctly, Plaintiffs' Petition seeks a judgment forbidding a local Presbyterian church from unilaterally withdrawing from the national church and taking the church's assets, including real property, with it. Plaintiffs want these assets turned over to a commission designated by it for management and control. Plaintiffs' Petition also asks for an accounting for funds spent. A brief factual background is necessary in order to proceed further.

In 1866 the Walnut Street Church, the predecessor of Memorial Presbyterian Church, was expelled from the national church for disobeying the General Assembly. In 1877 the Walnut Street Church was reunited with the national church. In 1878 the church moved to Washington and Compton Avenues

and was known as the Washington and Compton Avenues Presbyterian Church. In 1926 the church moved to Skinker Boulevard at which location it has remained and has been known as Memorial Presbyterian Church. In 1975 Memorial merged with Kingsland Presbyterian Church but has continued to be known as Memorial Presbyterian Church.

On May 27, 1980, the Memorial congregation adopted a resolution opposing a proposed amendment to the church's Book of Order. This amendment would have expressly stated that local church property is held in trust for the national church. Following submission of the amendment to the General Assembly, the congregation voted unanimously to terminate its association with the national church. A letter was sent to the clerk of the Presbytery reporting the action taken. The amendment was passed by the General Assembly and became effective in 1981.

In August of 1980 the Presbytery appointed a commission to investigate the action taken by Memorial Presbyterian Church. Following requests for a meeting with the session of Memorial Presbyterian Church, which were turned down, the Presbytery voted to adopt a resolution declaring the action taken by Memorial to be null and void. The Presbytery also voted to appoint a commission to replace the session of Memorial. No appeal was taken by Memorial toward any action taken by the Presbytery.

Memorial insists that its attempt to terminate its connection with the national church was effective. Memorial has also installed a pastor without any action by the Presbytery.

The United States Supreme Court in *Watson v. Jones,* 80 U.S. 679 (1871), held that where a right of property in a hierarchical church dispute is dependent upon a question of doctrine, discipline, ecclesiastical law, rule or custom of church government that has been decided by the highest tribunal within the church to which it has been carried, the civil court must accept that decision as conclusive.

The rule of deference of *Watson* was followed in the most recent decision of the Missouri Supreme Court, *Hayes v. Manning,* 172 S.W. 897 (Mo. 1914). *Hayes* involved a dispute over control of certain property of the Cumberland Presbyterian Church of Marshall, Missouri, following the merger of the Cumberland denomination into the Presbyterian Church in the United States. The dispute centered on the authority of the higher church authorities, absent an express grant of authority in the church constitution, to merge into a larger Presbyterian denomination. In holding in favor of the church, the court construed a clause providing that "The jurisdiction of the church judicatories is limited by the express provisions of the constitution" to mean that the authority of the church's General Assembly extends over the church as an organization. The limiting language was interpreted as applicable only should the higher church body attempt to exercise authority over a particular church other than by appeal. The court also said that a court need not find an express provision in the church constitution authorizing a particular act, but that the higher church judicatories have certain inherent powers such as are necessary to permit them to exercise the duties imposed upon them. Unless the authority to do an act is expressly withheld from the higher church adjudicatories, the individual members will be bound by such action. l.c. 903.

Finally, the court said that when one joins an organized society such as a church, one agrees to be bound by the rules, orders and judgments of the organization's courts. l.c. 902. Under the Presbyterian form of government, the church courts have all power except as limited by the constitution. l.c. 903.

The United States Supreme Court discussed these issues in *Jones v. Wolf,* 443 U.S. 595, 61 L.Ed.2d 775, 99 S.Ct. 3020 (1979). In that case the Court said that the First Amendment to the United States Constitution prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice. Under the First Amendment the civil courts

must defer to the resolution of issues of religious doctrine or polity by the highest court in a hierearchical church organization.

In *Jones,* the Georgia court applied the neutral principles of law doctrine. The United States Supreme Court said that the neutral principles of law approach was consistent with general constitutional principles. The Court also that if state law requires the identity of a local church to be identified according to the laws and regulations of the national church, then the state court must give deference to a Presbyterial commission's determination of the church's identity.

The Supreme Court in *Jones* did not say that the states must apply the neutral principles approach. The Court merely said that the neutral principles approach is constitutional. The Court also said, however, that if state law requires the courts to give deference, then the courts must do so. As indicated earlier, though, *Hayes v. Manning* requires and holds to the rule of deference of *Watson*. Therefore, state law in Missouri requires this Court to give deference to the decision of the highest tribunal within the church.

Under Article 5, §2 of the Missouri Constitution, a decision of the State Supreme Court is binding upon the lower state courts and only the Supreme Court has the authority to alter it or render it less severe. *Pitts v. Malcolm Bliss Mental Health Center,* 521 S.W.2d 501, 503 [1, 2] (Mo.App. 1975); *Bruno v. Murdock,* 406 S.W.2d 294, 297 [2] (Mo.App. 1966). The state court judges in Missouri are bound by the supreme law of the land as declared by the United States Supreme Court. *Hanch v. K.F.C. National Management Corporation,* 615 S.W.2d 28, 33 (Mo. banc 1981); *Kraus v. Board of Education of City of Jennings,* 492 S.W.2d 783, 784-85 (Mo. 1973).

This Court, a circuit court, must follow the rule of deference of *Hayes* and *Watson* until the Missouri Supreme Court has overruled or modified *Hayes.* This has not occurred.

In the case currently under consideration, which involves a dispute between a local congregation and the Presbytery, the Court must first look at the church organization and structure to determine how ultimate authority over church property is allocated and then see if the higher church adjudicatory has decided the issue. *Watson, supra.*

The form of organization of the United Presbyterian Church in the United States of America is hierarchical. The judicial and administrative powers are vested in four ascending levels of adjudicatories: The session of the local church, the Presbytery made up of ministers and laymen in a small area, the Synod covering a larger area, and the General Assembly.

The Plaintiffs in this case argue first that a local congregation has no right to unilaterally withdraw from the church without the approval of the higher church adjudicatories. Although the local congregation did vote to withdraw, the Presbytery voted 91 to 12 to adopt a resolution asserting the Presbytery's determination to maintain the basic principle that each congregation within the Presbyterian Church is a part of the whole and has no authority to terminate its connection with the denomination. (Plaintiffs' Exhibit T, pp. 13-14). The Presbytery also adopted a resolution declaring the action taken by Memorial Presbyterian Church and its session to be null and void and of no effect. (Plaintiffs' Exhibit T, p. 15).

This action taken by the Presbytery is consistent with provisions of the Book of Order. Section 35.01 provides that under the principles of Presbyterian Church government, the several different congregations constitute one church and that a larger part of the church shall govern a smaller when controversies arise. Section 34.01 provides that a particular church consists of a number of Christians voluntarily associated together and submitting to a certain form of govenment. No provision of the Book of Order gives the local church session the power to withdraw and no section exempts such a decision from review

by the Presbytery. See dissenting opinion of Justice Powell in *Jones, supra,* 443 U.S. at page 621.

When the issue as to whether a local Presbyterian Church may withdraw has been considered by civil courts the right has been uniformly denied because of the hierarchical structure of the church. Annot., 52 A.L.R. 324, §25 (1973). Such a determination is supported by Plaintiffs' Exhibits PP and QQ, minutes from meetings of the General Assembly in 1866 and 1867.

This Court finds that under Presbyterian Church law a local congregation does not have the right to unilaterally withdraw without the assent of the Presbytery. Therefore, this Court finds in favor of the Plaintiffs on their petition seeking control over the church property. Under the Book of Order, Section 41.14 (sic) the Presbytery has the power to replace the local church's session with a commission.

In a recent Texas case the Court considered the right of a local Presbyterian Church to withdraw unilaterally from the Presbyterian Church in the United States. The court said that the net effect of a church's withdrawal is the dissolution of the local church, which is an integral part of the national church, and the establishment of an independent church. Under the Book of Order only the Presbytery may dissolve a local church and until the Presbytery does so, the local church remains subject to control by the Presbytery. If the church is dissolved, then under the Book of Order the property comes under the control of the Presbytery. The court said that this result would be reached even where the vote to withdraw is unanimous. *Presbytery of Covenant v. First Presbyterian Church of Paris, Inc.,* 552 S.W.2d 865 (Tex.Cir.App. 1977).

The Book of Order of the United Presbyterian Church in the United States of America contains in Sections 62.11 and 62.12 similar provisions to those considered in the Texas case. Therefore, following the reasoning applied in that case, this Court reaches a similar result.

Although such a result may appear somewhat harsh, the Missouri Supreme Court in *Hayes* pointed out that when one joins a church, one agrees to be bound by the rules and orders of the Church's judicatories. At the time the present members of Memorial Presbyterian Church joined the Church it is unlikely that they considered the possibility of this situation arising. It is rather more likely that they realized they were joining a part of a national church, and that the Presbyterian Church they were joining was part of a hierarchical church organization.

In addition, the language of the United States Supreme Court in *Jones* suggesting that churches put an express provision in their constitutions governing the ownership of church property has now been followed by the United Presbyterian Church in the United States of America. (Plaintiffs' Exhibit ZZ, Chapter XLII). To rule in favor of the Defendants in this case would require the Court to disregard the church's interpretation of church law under circumstances that could no longer arise. It should be remembered that in passing the amendment to the Book of Order covering ownership of church property, the church asserted that the amendment was declarative of principles to which the church has adhered from its inception. (Plaintiffs' Exhibit ZZ, Chapter XLII).

Were this Court not bound to follow *Hayes,* it might reach a more equitable result, despite the arguments just presented as a rationale for finding in favor of Plaintiffs. This result would be to find in favor of Defendants by using the neutral principles of law approach approved by the United States Supreme Court in *Jones v. Wolf, supra.* For cases applying neutral principles, see *Foss v. Dykstra,* 319 S.W.2d 499 (S.D. 1982); *Graffan v. Wray,* 437 A.2d 627 (Me. 1981); *Protestant Episcopal Church v. Baker,* 171 Cal.Rptr. 541 (Ca-.App. 1981). Under this approach the Court examines the charter of the local church, the deeds to church property, the Book of Order of the general church organization, and any state statutes governing the holding of church property in purely secular terms. The

Supreme Court said that the primary advantages of this approach "are that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity. The method relies exclusively on objective, well established concepts of trust and property law familiar to lawyers and judges. It thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice." 443 U.S. at 603, 61 L.Ed.2d at 784-85.

Applying the neutral principles approach to the facts of this case, this Court could find that because there was no provision in the Book of Order indicating that a local church may not withdraw from the national organization, the local church may withdraw. Title to the property is in the Washington and Compton Avenue Presbyterian Church. (Defendants' Exhibits 12 and 13). The articles of merger of Memorial Presbyterian Church and Kingsland Memorial Presbyterian Church state that the purpose and object of the association shall be to hold title to the real estate and personal property of the church. (Defendants' Exhibit 34). It is conceded that there was no express provision in the Book of Order at the time this action arose stating that property owned by the local church is held in trust for the national church. Finally, the Memorial Trust Fund established in 1922 was established for the local church with no mention of the national church. (Defendants' Exhibit 39, see also Defendants' Exhibits 5, 7, 16, 17, 18 and 47). There is also some evidence that members of Memorial Presbyterian Church have considered the local church to be the sole owner of the property. (Defendants' Exhibit 29).

The Defendants also claim to have reached a special agreement with the national church regarding the nature of their association. Although under the deference approach this allegation would be entitled to little consideration, it would be an additional circumstance to be considered under the neutral principles approach.

A final equitable argument in favor of the local church members is that the vote to withdraw was unanimous and the fact that 43 current members of the church have been active in it since at least 1939. A ruling for Plaintiffs results in these members' loss of the church property they have invested so much of their time and money in. They are left in the same position as if they had withdrawn individually. However, once again, this Court states it is bound to follow *Hayes v. Manning,* and therefore, cannot find in favor of Defendants. The rule of deference must be applied.

Accordingly, judgment ordered entered in favor of Plaintiffs on Plaintiffs' Petition in that Defendants shall forthwith deliver to the commission appointed by the Presbytery all assets, funds and property, both real and personal, now under the management and control of Defendants belonging to Memorial Presbyterian Church. This shall include all records pertaining to said assets, funds and property. Possession of the church building and place of worship at 201 South Skinker Boulevard, St. Louis, Missouri, shall forthwith be tendered by Defendants to Plaintiffs. Defendants shall account to said commission for any and all assets, funds and property disposed of heretofore, or during the pendency of this litigation, for purposes other than purposes of Memorial Presbyterian Church as a particular church of the United Presbyterian Church in the United States of America. Costs are to be taxed against Defendants.

At trial, the Court reserved ruling on certain of Defendants' objections to the admission of certain of Plaintiffs' exhibits and Plaintiffs' objections to the admission of some of Defendants' exhibits. The Court now overrules Defendants' objections to the admission of Plaintiffs' exhibits A, B, C, D, E, K, L, N, T, U, W, X, Y, Z, AA, BB, CC, EE, GG, PP, QQ, RR, SS, ZZ, AAA, K1 and W1. The Court now sustains Plaintiffs' objections to the admission of Defendants' exhibits 26 and 31 and overrules Plaintiffs' objections to the admission of Defendants' exhibits 29 and 46.

SO ORDERED:

George A. Adolf, Judge

Date: Dec. 16, 1982

cc: Richard D. Shewmaker, Esq.
Timothy Belz, Esq.
W. J. Williamson, Esq.

APPENDIX C

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

Cause No. 814-00244

Division No. 2

Presbytery of Elijah
Parish Lovejoy, et al.,
Plaintiffs,

v.

Paul Jaeggi, et al.,
Defendants.

FINAL JUDGMENT

This cause having been heard by the Court on September 13 and 14, 1982 as recited in the Memorandum Opinion and Order of Court dated December 16, 1982, and the Plaintiffs on December 30, 1982 having filed their motion to amend the judgment included in said order, and the Defendants on January 3, 1983 having filed their motion to amend said Memorandum Opinion and Order, and the Court having heard said motions on January 13, 1983, with counsel for both Plaintiffs and Defendants appearing at that time, and the Court now being fully advised in the premises, the Plaintiffs' said motion is sustained in part and the Defendants' said motion is denied, and it is now ordered that the judgment included in said Memorandum Opinion and Order of Court dated December 16, 1982, is hereby amended to read as in this Final Judgment provided, (but the Court's rulings on objections in said Memorandum Opinion and Order are not affected hereby) and it is now ORDERED, ADJUDGED AND DECREED as follows:

1. A motion to dismiss on the ground of failure of the petition to state a claim on which relief can be granted against Defen-

dant George Scotchmer, having been sustained on January 28, 1982, and no further proceedings having been had herein with respect to him, this case is dismissed as to Defendant George Scotchmer, and the term "Defendants" where hereinbefore or hereinafter used, refers to the other Defendants.

2. The Defendants shall forthwith deliver to the commission appointed by the Presbytery all assets, funds and property, both real and personal, now under the management and control of Defendants belonging to Memorial Presbyterian Church. This shall include all records pertaining to said assets, funds and property. It shall also include all such assets, funds and property which are under such management and control on the date of compliance by Defendants with this decree. The term "property" includes records and minute books of the congregation and the session of Memorial Presbyterian Church and records of the members of the church and their addresses and all other property, including supplies, of whatsoever kind. Possession of the church building and place of worship at 201 South Skinker Boulevard, St. Louis, Missouri, shall forthwith be tendered by Defendants to Plaintiffs. Defendants shall account to said commission for any and all assets, funds and property disposed of heretofore, or during the pendency of this litigation, for purposes other than purposes of Memorial Presbyterian Church as a particular church of The United Presbyterian Church in the United States of America. All persons acting under the authority of the Defendants, or associated or participating with them, are hereby enjoined from doing or neglecting any act or thing the doing or neglecting of which would prevent or interfere with the carrying out of this judgment. Costs are to be taxed against the Defendants.

3. The issues raised by the pleadings have all been adjudicated by the foregoing provisions of this judgment and this judgment is hereby specifically designated as a final judgment for purposes of appeal, pursuant to Rule 81.06 of the Rules of Civil Procedure. The carrying out of this judgment may or may not

give rise to other claims or controversies requiring judicial determination, such as whether specific assets, funds or property are to be included among those to be delivered or accounted for pursuant to this judgment, and the Court accordingly reserves jurisdiction to determine any and all such claims and controversies, upon supplemental pleadings, if any such become necessary.

Dated: January 13, 1983

George A. Adolf
Judge

APPENDIX D

IN THE SUPREME COURT OF MISSOURI

No. 65853

Presbytery of Elijah Parish Lovejoy by its representatives, the commission members named below, and Cartley Burroughs, Tracy Huston, Manley Mace, William T. Hancock, Richard D. Shewmaker and Lorna Wagner, and Presbytery Of Elijah Parish Lovejoy, Inc., a Missouri pro forma decree corporation,

Plaintiffs-Respondents,

vs.

Paul Jaeggi, Paul Barker, Harold Bowerman, Robert Canfield, Ben Carter, George Devlin, William Dick, Karl Dolde, Jim Hydar, Terry Jones, George Lanz, Robert Parks, Frank Rall, Dan Smith, Darold Strand, Arthur Tapy, and Memorial Presbyterian Church of St. Louis, a Missouri pro forma decree corporation,

Defendants-Appellants.

RESPONDENTS' MOTION FOR A REHEARING and ALTERNATIVE MOTION TO MODIFY

MOTION FOR REHEARING

The respondents* move that the opinion of this Court in this case be withdrawn, a rehearing granted and the judgment appealed from affirmed on the following grounds:

---

* The so-called Northern and Southern Presbyterian denominations merged in 1983 so that the present name of the denomination involved in this case is the "Presbyterian Church (U.S.A.)". Effective January 1, 1985 the name of the plaintiff Presbytery (as a result of its merger with the former "Southern" Presbytery) became Presbytery of Giddings-Lovejoy. In these motions and the accompanying suggestions, they will continue to be referred to by their former names.

1. A judgment in accordance with the opinion of this Court would deprive the plaintiffs and the United Presbyterian Church in the United States of America (hereinafter referred to as the "UPCUSA") of their rights to the free exercise of religion guaranteed by the First Amendment to the Constitution of the United States and made applicable to the states by the Fourteenth Amendment, and would deny them property rights arbitrarily and without due process of law in violation of the due process clauses of the Fourteenth Amendment and of Section 10 of Article 1 of the Constitution of Missouri in this: Such judgment would deny effect to the provisions of the organic law of the UPCUSA, by which the UPCUSA is constituted as one church, of which the particular churches, including Memorial Presbyterian Church, are subordinate parts, and would refuse to enforce the provisions giving the plaintiff Presbytery (and its commission) the right to take control of a particular church (in this case Memorial Presbyterian Church) and its property and would effectively extinguish all property rights of the plaintiffs or the UPCUSA with respect to Memorial Presbyterian Church's property.

2. The opinion overlooks the fact that *Jones v. Wolf* (1979) 443 U.S. 595, 61 L.Ed.2d 775, 99 S.Ct. 3020 holds that provisions of the constitutions of denominations such as the UPCUSA are entitled to be enforced especially when, as in the case at bar, the provisions of which enforcement is sought are in "some legally cognizable form". The failure of the opinion to give effect to this results in the unconstitutional action referred to in Point 1 of this motion.

3. Prior to the present decision, churches (including the UPCUSA) which were constituted as one church of which particular or local churches are subordinate parts, had rights under the law of Missouri, (and particularly *Hayes v. Manning* (1914) 263 Mo. 1, 172 S.W. 897) with respect to the property of the local churches (such as and including Memorial Presbyterian Church). These rights are now destroyed, retroactively, by the

overruling (to the extent inconsistent with the present holding) of the *Hayes* case. As a result plaintiffs and the UPCUSA are deprived of their free-exercise of religion rights guaranteed by the First Amendment aforesaid, and their heretofore existing property rights are arbitrarily and without due process of law denied and destroyed in violation of the due process clauses aforesaid.

4. A judgment in accordance with the opinion of this Court would violate Section 7 of Article 1 of the Constitution of Missouri and particularly the provision that "no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship" and would also deprive the plaintiffs and the UPCUSA of the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States, in this: That the opinion requires an express trust or one implied in fact to establish UPCUSA's rights with respect to control of Memorial Presbyterian Church, and is not satisfied with the kind of implied trust that results from Memorial's being a subordinate part of the UPCUSA or from the explicit provisions as to control contained in the Book of Order of the UPCUSA, but the opinion lets stand without mention the decision involving the Roman Catholic Church in *Struemph v. McAuliffe* (Mo.App.E.D. Sept. 6, 1983) 661 S.W.2d 559 which upholds the authority of the Roman Catholic Church without any requirement of the showing of an express trust or one implied in fact.

5. The opinion apparently assumes that respondents' argument depends entirely on *Hayes v. Manning* (1914) 293 Mo. 1, 172 S.W. 897 and *Watson v. Jones* (1872) 80 U.S. 679, 20 L.Ed. 666, the rule in which was adopted by the *Hayes* case, for the opinion does not discuss any of respondents' contentions at all. The opinion in particular ignores Point II of respondents' principal brief, reading as follows: "The decision in *Jones v. Wolf* (1979) 443 U.S. 595, 61 L.Ed.2d 775, 99 S.Ct. 3020 holding con-

stitutional the 'neutral principles of law' applied by the Supreme Court of Georgia in that case, does not permit the ignoring of the provisions of the Church Constitution involved in the case at bar. On the contrary, those provisions are entitled to enforcement under the Constitution of the United States."

6. The opinion holds in effect that a denominational church of which the local churches are integral but subordinate parts cannot assert authority over the property of the local churches *even by provisions that explicitly say that it may do so* unless a trust can be found in the corporate charter or by-laws of the local church, in the instruments conveying property, in state statutes, or in denominational constitutions by whatever names they are called. This is a radical change in the law with respect to a very important matter, affecting all denominations in this state except those where the local churches are independent entities. Yet the opinion contains no discussion of the desirability of this change in the law.

7. The opinion ignores the fact that the *result* of this case (regardless of legal theory) is contrary to the weight of authority after (as well as before) "neutral principles" was first mentioned in 1969 in *Presbyterian Church in the United States v. Hull Memorial Presbyterian Church* (1969) 393 U.S. 440, 21 L.Ed.2d 658, 89 S.Ct. 601, and is also contrary to the weight of authority since the decision in *Jones v. Wolf* (1979) 443 U.S. 595, 61 L.Ed.2d 775, 99 S.Ct. 3020.

8. The opinion misapprehends the effect of the failure of the proposal in 1929 to require articles of incorporation of local churches to declare that their property "is held in trust under the constitution of and for" the national church. The Council that submitted that proposal recognized that the denomination's rights "in the property of a particular church are adequately protected" as a result of litigation in connection with the Cumberland Reunion in 1906—of which litigation *Hayes v. Manning* (1914) 263 Mo. 1, 172 S.W. 897, was of course a part.

9. The opinion (p. 21) misapprehends the significance of §35.01 of the Form of Government, which is the *unity* of the whole denomination as "*one Church*". That is the primary significance of that section. The UPCUSA is, as we have repeatedly stated, *not* an association of churches.

10. The opinion misreads the dissenting opinion in *Jones v. Wolf* (1979) 443 U.S. 595, 61 L.Ed.2d 775, 99 S.Ct. 3020, when it says (p. 8), "Even the dissenters, however, conceded, that the neutral principles rule suffices to settle disputes 'between the central councils of a church organization and a unanimous local congregation.' 443 U.S. at 614." Mr. Justice Powell nowhere indicated agreement with the "neutral principles rule" as applied to any situation. What he was saying was that the only situation where the "neutral principles" rule would work *even on its own premises* is where the controversy is between the denomination and a unanimous local church. He did not concede at all that that would do justice in that situation. He said (443 U.S. l.c. 614):

> "The Court's basic neutral-principles approach, as a means of isolating decisions concerning church property from other decisions made within the church, relies on the concept of a trust of local church property in favor of the general church. Because of this central premise, the neutral-principles rule suffices to settle only disputes between the central councils of a church organization and a unanimous local congregation. Where, as here, the neutral-principles inquiry reveals no trust in favor of the general church, and the local congregation is split into factions, the basic question remains unresolved: which faction should have control of the local church?"

11. The opinion does not give the same protection to churches of the kind where the local churches are subordinate parts of a denominational body which has authority over them, as the law gives to other organizations where there is a superior body with subordinate bodies under it—for example, labor unions.

ALTERNATIVE MOTION TO MODIFY

In the alternative, in the event the motion for rehearing should not be granted, respondents move that this Court's decision be modified by the adoption of one or both of the following proposed modifications:

A. That the judgment to be entered herein grant the relief prayed in ¶3(a) of the prayer of the petition (L.F. 28) so as to include an injunction against the defendants enjoining the use of any property or funds of Memorial Presbyterian Church for the salary, use or compensation of any pastor, or associate, assistant or interim pastor, or any temporary or stated supply for its pulpit except such with respect to whom all action by the Presbytery of Giddings-Lovejoy or an agency thereof as required by the Form of Government of the Presbyterian Church (U.S.A.) shall have taken place and remain in effect.

B. That the Court withdraw its opinion and give the Presbytery opportunity to determine whether it desires *now* to dissolve Memorial Presbyterian Church under §42.08 of the Form of Government, so as to make applicable the provision of §62.11 by which the property of a dissolved church is to be turned over to the Presbytery.

Our Suggestions accompanying these motions are in a separate pamphlet.

SHEWMAKER & McNEARNEY

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CLERK OF THE SUPREME COURT
STATE OF MISSOURI
Post Office Box 150
Jefferson City, Missouri
65102

Thomas F. Simon
Clerk

January 15, 1985

Mr. John B. Shewmaker
Mr. Richard D. Shewmaker
225 South Meramec
St. Louis, Missouri 53105

In re: Presbytery of Elijah Parish Lovejoy, etc., et al. vs. Paul Jaeggi, et al., No. 65853

Gentlemen:

This is to advise that the Court this day entered the following order in the above entitled cause:

> "Respondents' motion for rehearing and alternative motion to modify overruled."

Very truly yours,

/s/ Thomas F. Simon
Clerk.

cc: Mr. Timothy Belz

FILED
MAY 1 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1579

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PRESBYTERY OF ELIJAH PARISH LOVEJOY by its representatives, the commission members named below, and CORTLEY BURROUGHS, TRACY HUSTON, MANLEY MACE, WILLIAM T. HANCOCK, RICHARD D. SHEWMAKER and LORNA WAGNER, and PRESBYTERY OF ELIJAH PARISH LOVEJOY, INC., a Missouri pro forma decree corporation,

Petitioners,

vs.

PAUL JAEGGI, PAUL BARKER, HAROLD BOWERMAN, ROBERT CANFIELD, BEN CARTER, GEORGE DEVLIN, WILLIAM DICK, KARL DOLDE, JIM HYDAR, TERRY JONES, GEORGE LANZ, ROBERT PARKS, FRANK RALL, DAN SMITH, DAROLD STRAND, ARTHUR TAPY, and MEMORIAL PRESBYTERIAN CHURCH OF ST. LOUIS, a Missouri pro forma decree corporation,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TIMOTHY BELZ*
BELZ & BELZ
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Counsel for Respondents

**Counsel of Record*

St. Lo[illegible] [illegible]-4477

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QUESTIONS PRESENTED

A. When a state court resolves a property dispute between church bodies on the basis of state law and does not inquire into religious doctrine or polity, does a petition for writ of certiorari involve a substantial federal question?

B. Did the Supreme Court of Missouri in this case violate the Religion Clauses of the First Amendment, as applied to the states through the Fourteenth Amendment, when it used "neutral principles of law"—a doctrine expressly approved by this Court in *Jones v. Wolf,* 443 U.S. 595 (1979)—to resolve a property dispute between church bodies?

PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties. The only corporation among the Respondents, Memorial Presbyterian Church of St. Louis, has no parent companies, subsidiaries or affiliates.

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No. 84-1579

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PRESBYTERY OF ELIJAH PARISH LOVEJOY by its representatives, the commission members named below, and CORTLEY BURROUGHS, TRACY HUSTON, MANLEY MACE, WILLIAM T. HANCOCK, RICHARD D. SHEWMAKER and LORNA WAGNER, and PRESBYTERY OF ELIJAH PARISH LOVEJOY, INC., a Missouri pro forma decree corporation,

Petitioners,

VS.

PAUL JAEGGI, PAUL BARKER, HAROLD BOWERMAN, ROBERT CANFIELD, BEN CARTER, GEORGE DEVLIN, WILLIAM DICK, KARL DOLDE, JIM HYDAR, TERRY JONES, GEORGE LANZ, ROBERT PARKS, FRANK RALL, DAN SMITH, DAROLD STRAND, ARTHUR TAPY, and MEMORIAL PRESBYTERIAN CHURCH OF ST. LOUIS, a Missouri pro forma decree corporation,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Memorial Presbyterian Church of St. Louis and the other Respondents, named in the caption hereof, respectfully request that this Court deny the Petition for Writ of Certiorari (the "Petition") which seeks review of the judgment of the Supreme Court of Missouri. The opinion of the Supreme Court of Missouri is reported at 682 S.W.2d 465.

JURISDICTION

We respectfully submit that the jurisdiction of this Court does not attach herein. Our argument is presented under "Reasons for Denying the Writ" *infra.*

STATEMENT OF THE CASE

The statement of facts in the Petition contains substantial errors and makes substantial omissions.

The Supreme Court of Missouri recognized that the principal adversaries "in this church property dispute" are the Presbytery of Elijah Parish Lovejoy (the "Presbytery"), and Memorial Presbyterian Church of St. Louis ("Memorial"), a corporation owning and controlling certain church property. (Petitioners' App., A-2). The Presbytery is a member of the United Presbyterian Church in the United States of America ("UPCUSA"), a nationwide religious denomination.[1]

The Supreme Court of Missouri found that Memorial was established in 1864, that in 1866 it "withdrew from the national church and did not reaffiliate with it until 1877," and that "[d]uring the separation Memorial retained all of the church property." (Petitioners' App., A-8, A-9). The Supreme Court of Missouri also found that "[o]n July 21, 1980, at a duly called concurrent meeting of the congregation and corporation of Memorial, a resolution was adopted, by a vote of 153 to 0 with one abstention, to terminate 'the voluntary association which has existed until now' between Memorial and the national church." (Petitioners' App., A-2).

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[1] The Presbytery of Elijah Parish Lovejoy and the UPCUSA no longer exist as such. In May 1983, the UPCUSA (the "Northern Presbyterian Church") merged with the Presbyterian Church in the United States (the "Southern Presbyterian Church") to form the Presbyterian Church (U.S.A.). Thereafter the Presbytery of Elijah Parish Lovejoy merged with its southern counterpart to form the Presbytery of Giddings-Lovejoy.

Almost a year later, on June 20, 1981, the Presbytery purported to replace Memorial's management with its own nominees and purported to take over control of Memorial's property. Memorial ignored these actions, contending that the Presbytery has had no jurisdiction over it since its disaffiliation on July 21, 1980. (Petitioners' App., A-11). The Presbytery filed suit, claiming the property.

The Supreme Court of Missouri examined the deeds to Memorial's property, the terms of Memorial's trust funds, Memorial's charter, the UPCUSA's Constitution (known as the "*Book of Order*"), and Missouri statutes. The Supreme Court of Missouri found that the deeds "name Memorial as grantee and make no mention of the national church," and that, with respect to several trust indentures (perpetual funds created to benefit Memorial and its ministries), none names the national church as a beneficiary. No provision in Memorial's charter or by-laws, said the Supreme Court of Missouri, "is relied upon by the national church to establish its property interest," and "[t]he national church does not claim that any Missouri statute serves to create a trust in its favor with respect to the property in dispute." Thus, "[i]n order for the national church to prevail under the neutral principles approach on the instant record it must do so [if at all] on the basis of the *Book of Order.*" (Petitioners' App., A-17, A-18) (Italics added).

The Supreme Court of Missouri noted that "in 1929 there was an unsuccessful attempt to amend the *Book of Order* so as to require a local church to provide in its articles of incorporation that its property was held in trust for the national church. It was not until May 1981, after Memorial's disaffiliation, that such an amendment was adopted." (Petitioners' App., A-18) (Italics added). The trial court had found that "there was no provision in the *Book of Order* indicating that a local church may not withdraw from the national organization" (Petitioners' App., A-27) (italics added), and the Supreme Court of Missouri reached the same factual result. The Supreme Court of

Missouri examined the *Book of Order* as it existed when Memorial disaffiliated on July 21, 1980, and found nothing that prohibited member churches from leaving the denomination or giving the Presbytery power over disaffiliated churches. (It was not until June 20, 1981, almost a year after Memorial had disaffiliated, that the Presbytery even purported to replace Memorial's management and take over Memorial's property.) The Supreme Court of Missouri also stated that it agreed with the holdings of the New York Court of Appeals and the South Dakota Supreme Court (see our argument *infra*) "that the *Book of Order,* as it existed on July 21, 1980, did not create an express or implied trust in favor of UPCUSA with respect to the property of Memorial." (Petitioner's App., A-19) (Italics added).

REASONS FOR DENYING THE WRIT

A. Because the Supreme Court of Missouri resolved this property dispute between church bodies on the basis of state law and did not inquire into religious doctrine or polity, the Petition for Writ of Certiorari does not involve a substantial federal question.

The Supreme Court of Missouri here expressly followed the guidelines set forth in *Jones v. Wolf,* 443 U.S. 595 (1979), this Court's most recent church property case, and in *Maryland & Virginia Churches v. Sharpsburg Church,* 396 U.S. 367 (1970), an earlier church property case cited with approval in *Jones. In Md. & Va. Churches,* this Court, *per curiam,* dismissed for want of a substantial federal question a case substantially similar to this:

> In resolving a church property dispute between appellants, representing the General Eldership, and appellees, two secessionist congregations, the Maryland Court of Appeals relied upon provisions of state statutory law governing the holding of property by religious corporations, upon language in the deeds conveying the properties in question to the local church corporations, upon the terms of the charters of the corporations, and upon provisions in the constitution of the General Eldership pertinent to the ownership and control of church property. 254 Md. 162, 254 A.2d 162 (1969). Appellants argue primarily that the statute, as applied, deprived the General Eldership of property in violation of the First Amendment. Since, however, the Maryland court's resolution of the dispute involved no inquiry into religious doctrine, appellees' motion to dismiss is granted, and the appeal is dismissed for want of a substantial federal question.

396 U.S. at 367-368 (footnotes omitted). The Supreme Court of Missouri in the case at bar and the Maryland Court of Appeals in *Md. & Va. Churches* reached their similar results by examin-

ing precisely the same kinds of evidence and without inquiring into religious doctrine or polity. (Petitioners' App., A-17).

We do not suggest that the Supreme Court of Missouri in the case at bar was unaware of the fact that the First Amendment places broad limits (defined in *Jones v. Wolf*) on the legal rules states may use to settle church property disputes. Its opinion shows a conscious recognition of those boundaries. But that does not mean that the Supreme Court of Missouri decided a federal question. To the contrary, the decision of the Supreme Court of Missouri, like the decision of the Maryland Court of Appeals in *Md. & Va. Churches,* was based entirely on state law. This Court does not grant certiorari to review matters of state law.

B. The Supreme Court of Missouri in this case did not violate the Religion Clauses of the First Amendment, as applied to the states through the Fourteenth Amendment, when it used "neutral principles of law" to resolve a property dispute between church bodies.

It is settled that state courts do not violate the First Amendment when they apply "neutral principles of law" to adjudicate church property disputes. Courts must only avoid inquiry into religious doctrine or polity. The seminal case is *Jones v. Wolf,* 443 U.S. 595 (1979), a dispute involving the Presbyterian Church in the United States (sometimes called the "Southern Presbyterian Church"),[2] a denomination whose internal laws,

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[2] Petitioners' attempts to distinguish *Jones v. Wolf* are groundless. Petitioners state, with no reference to the record, that the Southern Presbyterian Church did not have constitutional provisions present here. While we would be glad to compare specific provisions of the two constitutions, we will not, because the Constitution of the PCUS is not in the record here.

Actually, except for the fact that *Jones v. Wolf* involved a substantial split in the congregation, and this case involves a unanimous congregation, the substantive facts in the cases are similar. For instance,

as described in *Jones v. Wolf,* are substantially identical to those of the UPCUSA in this case. Moreover, this Court noted that one of the "primary advantages" of the neutral principles approach is that it can "accommodate all forms of religious organization and polity." 443 U.S. at 600. Thus "neutral principles" have been employed to resolve property disputes among organizations varying widely in doctrine and polity. Specifically, appellate courts in six states, in addition to Missouri, have used "neutral principles" to resolve property disputes involving the UPCUSA (sometimes called the "Northern Presbyterian Church"). *Presbytery of Beaver-Butler v. Middlesex Presbyterian Church,* No. 36 W.D. App. 1984 (Pa. 1985); *First Presbyterian Church of Schenectady v. UPCUSA,* 62 N.Y.2d 110, 476 N.Y.S.2d 86, 464 N.E.2d 454, *cert. denied,* 105 S.Ct. 514 (1984); *Foss v. Dykstra,* 342 N.W.2d 220 (S.D. 1983); *York v. First Presbyterian Church of Anna,* No. 5-83-0716 (Ill.App., Nov. 9, 1984), *motion for leave to appeal denied,* No. 63128 (Ill. 1985); *Christensen v. Roumfort,* No. 83 CA. 124 (Ohio App., August 29, 1984); *Presbytery of Riverside v. Community Church of Palm Springs,* 89 Cal.App.3d 910, 152 Cal.Rptr. 854, *cert. denied,* 444 U.S. 974 (1979).

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in *Jones v. Wolf* the presbytery appointed an administrative commission after the congregation voted to disaffiliate. The commission declared that the congregational minority was the true congregation and attempted to withdraw all authority from the majority. But the congregation ignored the commission's actions and did not appeal to a higher church court, since it had disaffiliated and contended that the presbytery no longer had any jurisdiction over it.

In the case at bar, there was no minority faction loyal to the UPCUSA. Nevertheless, after the unanimous vote to disaffiliate, the Presbytery's administrative commission attempted to withdraw all authority from the church officers. As in *Jones v. Wolf,* the congregation ignored the commission's actions and did not appeal to a higher church court, since it had disaffiliated and contended that the Presbytery no longer had any authority over it.

All seven of these appellate courts upheld the right of a congregation to leave the UPCUSA without forfeiting its property. Petitioners would, in effect, have this Court declare unconstitutional all of the above seven cases—even including the New York and California cases, in which this Court has already denied writs of certiorari—to say nothing of the innumerable cases in many states which have applied "neutral principles" in situations involving the Southern Presbyterian Church and to a variety of non-Presbyterian churches.

The same *Book of Order,* with the exact same provisions, has been in evidence in each of these seven cases, and the Petitioners' arguments are identical to those previously deemed unworthy of certiorari by this Court. For instance, in *First Presbyterian Church of Schenectady, supra,* the UPCUSA's rejected Petition for Writ of Certiorari argued that the New York Court of Appeals violated the denomination's free exercise rights when it refused to enforce the denomination's construction of § 41.15 of the *Book of Order.* Petitioners here use precisely the same argument.

This case involves a written agreement—the *Book of Order.* It has been recognized by appellate courts in all of the above seven states that the *Book of Order,* as it read at the time Memorial disaffiliated, did not forbid member churches from quitting the denomination, and did not contain any language creating a trust in favor of the denomination. In 1929 the General Council of the General Assembly of the UPCUSA proposed that its Constitution be amended to require that the charter of each local church declare "that its property is held in trust under the Constitution of and for [the national church]." This amendment was rejected. Not until May 1981, almost a year after Memorial disaffiliated, was the *Book of Order* amended to contain language of trust and to contain provisions requiring forfeiture of property to presbytery when a congregation disaffiliates. (Petitioners' App., A-9, A-10). Construction of written instruments (as to whether they create a trust, for in-

stance) is obviously a matter primarily for the states. Given the above facts, it cannot be said that the construction independently adopted by these appellate courts in seven states is unreasonable.

The result urged by Petitioners would have itself violated the Religion Clauses. They claim a right to property they have not owned, controlled, or paid for, without warrant in church law. Prior to 1981, there was nothing in UPCUSA church law which forbade unhappy congregations from leaving with their property. To award Memorial's property to the Presbytery would therefore have violated the free exercise rights of Memorial, which had always maintained exclusive ownership of and control over its property, to an extent thoroughly inconsistent with the Petitioners' claims. (Petitioners' App., A-8, A-9, A-10, A-17, A-18). Moreover, such a result would also have violated the Establishment Clause. Had the Supreme Court of Missouri yielded its gavel to Petitioners and deferred to their desires as to the disposition of property belonging to an ex-member congregation, that would have constituted a serious violation of the Establishment Clause.[3] This Court has held that "delegating a governmental power to religious institutions" violates the Establishment Clause. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 123 (1982).

By employing "neutral principles," the Supreme Court of Missouri avoided all these (and many other) problems. Like the appellate courts in the six other states mentioned above, the Supreme Court of Missouri applied familiar state property law without inquiring into church doctrine or polity. In so doing, the court adhered to the principles set forth by this Court in *Jones v. Wolf*.

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[3] The decision of the Supreme Court of Missouri was not *based* on these constitutional considerations. It was based solely on state law. We mention these points only to show the constitutional problems into which the Supreme Court of Missouri would have plunged itself had it deferred to Petitioners rather than apply "neutral principles."

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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No reply, we believe, is needed to the obfuscatory parts of respondents' brief, such as the recitation (pp. 3-4) of the reasons

why the Supreme Court of Missouri found there was no trust[1], the pretense (footnote 2, p. 6) that instead of *relying,* as we are, on the opinion of the Court in *Jones v. Wolf* (1979) 443 U.S. 595, we are attempting to "distinguish" that case, and such things as the reference (p. 8) to "innumerable" cases in many states "which have applied 'neutral principles' in situations involving the Southern Presbyterian Church and to a variety of non-Presbyterian churches."

But there are two things which, we believe, should be mentioned.

First, the importance of the present petition is shown by the fact that, as stated on page 7 of respondents' brief, there are six very recent cases — five plus the case at bar — one decided in 1983, three (including our case) in 1984, and two in 1985, which decided against the UPCUSA and in favor of local congrega-

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[1] Respondents' counsel twice (p. 3 and p. 8) refer to the proposal in 1929 (which failed of adoption) of an amendment to require local churches to include provisions that their "property is held in trust under the Constitution of and for [the national church]." (App. A-9). This amendment would have been along the same lines as the provision of the Methodist Book of Discipline referred to in footnote 2 of the Court's opinion in *Jones v. Wolf* (443 U.S. at 600). It is different from the amendment adopted in 1981 in response to *Jones v. Wolf* (quoted App. A-10). The General Council which recommended the 1929 amendment made it clear in its report (Defendants' Ex. 35f p. A931) that it did not consider the amendment necessary, but that by its adoption the denomination's property interests would be "doubly safeguarded", and said, "The widespread litigation in connection with the Cumberland Reunion in 1906 has made it certain that when properly presented the rights of the Presbyterian Church in the U.S.A. in the property of the particular church are adequately protected in the civil courts of all of our states." *Hayes v. Manning* (1914) 263 Mo. 1, 172 S.W. 897, was of course a part of that "widespread litigation". But of course none of this discussion has anything to do with the constitutional question presented by our petition for certiorari.

tions that were attempting to withdraw[2]. Two of these are so recent they may come here by application for certiorari.

Second, respondents' brief does not even attempt to answer the proposition that the explicit provision (Section 41.15) in the UPCUSA's constitution authorizing the taking of temporary control of a local church by the denominational church of which it is a part, is entitled to enforcement as a matter of constitutional law, under the opinion of the Court in *Jones v. Wolf*. Instead of trying to answer this proposition, counsel argue, in substance, that after what they repeatedly (starting on page 3) call Memorial's "disaffiliation" — i.e. after Memorial's unilateral attempt to withdraw on July 21, 1980 — the provisions of the UPCUSA's constitution could have no further effect, so that the Presbytery's action after that time was nugatory.

This is of course a question-begging argument. If in *Jones v. Wolf* the Vineville church had been able by the simple act of "disaffiliation" to cut off all the rights of the denomination, there would have been no occasion to vacate and remand the Georgia court's decision. The dissent charged (and the opinion of the Court with equal vigor denies) that the decision was imposing a congregational form of government on a church in which the local churches are subordinate parts of a larger whole — a result which, we submit, the Supreme Court of Missouri has accomplished in the case at bar by refusing to enforce Sec-

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[2] The Supreme Court of Missouri (App. A-12) cites two cases "in the wake of *Jones*" that hold the other way. In one of them certiorari was denied on February 21, 1984, *Babcock Memorial Presbyterian Church v. Presbytery of Baltimore* (1983) 296 Md. 573, 464 A.2d 1008, cert. den. 104 S.Ct. 1287. In the other, *Fonken v. Community Church of Kamrar* (Ia. 1983) 339 N.W.2d 810, certiorari was not applied for. The Maryland case is based on "neutral principles" and the Iowa case is based both on *Watson v. Jones* (1872) 80 U.S. (13 Wall.) 679, 20 L.Ed. 666, and "neutral principles".

tion 41.15 because there was no "trust" expressed in the Book of Order. But under the respondents' present argument you would never get to the question which split this Court 5 to 4; a local Presbyterian church could simply "disaffiliate" and all denominational rights would be gone. The distinction between so-called "hierarchical" churches — those so constituted that the denominational or national church is one church of which local or particular churches are subordinate bodies — and congregational churches, would be obliterated.

This extreme position (which, though a desperate one, is, we believe, forced on counsel for respondents by the lack of anything better) has led counsel to make statements such as the one on page 4 that the Supreme Court of Missouri "found nothing [in the Book of Order] that prohibited member churches from leaving the denomination or giving the Presbytery power over disaffiliated churches." These are not things the Supreme Court of Missouri was looking for. On the contrary, what the Supreme Court of Missouri looked for is what counsel say the Supreme Court of Missouri "also stated", when counsel say (p. 4), "The Supreme Court of Missouri *also* stated * * * 'that the Book of Order as it existed on July 21, 1980, did not create an express or implied trust in favor of UPCUSA with respect to the property of Memorial.' " (emphasis added)[3]

There are, as pointed out above, a number of cases where various state courts have misconstrued *Jones v. Wolf* so as to hold, in effect, that explicit and legally cognizable provisions of the UPCUSA's constitution could be disregarded because of lack of a trust of the kind the Georgia courts were looking for in the *Jones* case. But even these cases have not held that the

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[3] The trial court, citing rulings of the General Assembly over 100 years old (1866 and 1867) found (App. A-25): "that under Presbyterian Church law a local congregation does not have the right to unilaterally withdraw without the assent of the Presbytery."

denominational constitution is an illusory contract, terminable at the will of any particular church at any time for any reason or for no reason.

Respectfully submitted,

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